FREE COPY

Supreme Court of the United States

OCTOBER TERM, 1947

F. J. ENGLERT,

Petitioner,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSON CO., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

OSCAR A. ZABEL,
FREDERICK PAUL,
Counsel for Petitioners.

ZABEL, POTH & PAUL,
Of Counsel.
818 Fourth & Pike Building, Seattle, Washington.

Sherman Printing & Binding Company, Seattle

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

F. J. ENGLERT,

Petitioner,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSON CO., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

OSCAR A. ZABEL,
FREDERICK PAUL,
Counsel for Petitioners.

ZABEL, POTH & PAUL,
Of Counsel.
518 Fourth & Pike Building, Seattle, Washington.

Sherman Printing & Binding Company, Seattle

CONTENTS

	Page
Petition	1
Summary Statement of Matter Involved	2
Reasons Relied on for Issuance of Writ	4
Prayer	4
Brief	6
Official Reports	6
Jurisdiction	6
Dates of Judgments Below	7
Specifications of Error	7
Argument	8

CASES CITED

	Page
Bogardus v. Commissioner, 302 U.S. 35, 39	8
Higgins v. Carr Bros. Co., 317 U.S. 572	8
Soderberg et al. v. these respondents	2, 9
Walling v. Jacksonville Paper Co., 317 U.S. 564	4, 8

STATUTES CITED

	Page
Fair Labor Standards Act of 1938	1, 2
29 U.S.C. 207(a)	1, 6
29 U.S.C. 216(b)	1, 6
28 U.S.C. Sec. 347(a) (Judicial Code, Sec. 240, as amended)	6
28 U.S.C. Sec. 350	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

F. J. ENGLERT,

Petitioner,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSON CO., a corporation,

Respondents.

To: The Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

F J. ENGLERT respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals (Judges Garrecht, Matthews and Healy) rendered its judgment June 27, 1947 (R. 127). The decision, reported at .... F. (2d) ....., affirmed a final judgment of the District Court of the Western District of Washington, Northern Division, in favor of respondents as to the period of employment of the claimant here involved, denying DONALD C. STUART any recovery for overtime wages alleged to be due under the Fair Labor Standards Act of 1938, 29 U.S.C. 207(a) and 216(b). The District Court's opinion is not reported but appears at R.

108-111. The opinion by the Circuit Court of Appeals appears at R. 119-127.

SUMMARY STATEMENT OF MATTER INVOLVED

This is an action for overtime compensation under the Fair Labor Standards Act of 1938. This petition is sought on behalf of petitioner for Cause of Action No. 2, Claimant DONALD D. STUART, a former employee of respondents.

The regular rate of pay, the number of overtime hours and the amount due petitioner as assignee of the employee is admitted and is noted in the margin.[1]

The issue is whether the duties of the claimant is an activity in "commerce," which in turn, is dependent upon whether the goods upon which he worked is in "commerce."

This is a companion case to *Soderberg, et al., v. these respondents*, now pending on petition for certiorari, and is being prosecuted for the petitioner as assignee of Donald D. Stuart, cause of action No. 2.

It was stipulated between the parties (R. 17)

[1]The employee worked for a stipulated salary per 48-hour week. The regular rate of pay was 1/48 of the stipulated salary. He had a uniform work week of 70 hours per week at the rate of 10 hours per day for which he was paid his stipulated salary for 48 hours and two times his regular rate for the 10 hours occurring on the seventh day of the week. He has thus due him one-half his regular rate for the hours between 40 and 48 each week; 1½ times his regular rate for the hours each week between 48 and 60. The overtime compensation due under the Act, and an equal amount as liquidated damages for the claimant is, $2457.62, being the total due.

that it was deemed essential by the Government of the United States that certain Islands of the Aleutian group in Alaska be fortified and improved, and structures erected so that the said Island could be utilized for the purpose of national defense. Among the various projects were the ones at which this claimant worked, as an employee of the respondents, who were the contractors for the building of the improvements and structures.

The respondents' contract, among other things, provided that the petitioner was to procure supplies for use in building the improvements and for the operation of a resale commissary, to furnish labor from Continental United States, and to operate mess halls and quarters.

The journey of the goods was from Continental United States to a dock in the Aleutian Islands, to a sorting or classification yard two miles away from the dock, to a material and supplies warehouse, from there to the fort or the commissary depending upon the type of goods. Claimant STUART, Cause No. II, worked in the company warehouses (R. 43), where he would check the purchase orders (by which the respondents purchased the goods for the Government in Continental United States) against the ships' manifests and make up a list of the goods received as compared with the goods ordered by the purchase orders (R. 87). He would also prepare the papers for the checkers who would check the merchandise at the sorting yard (R. 92, 102).

The District Court, in its oral decision, concluded

that the duties of claimant STUART were not within the coverage of the Act, because his duties were connected with materials after they got to the Island rather than before they got there (R. 109). The Circuit Court of Appeals held, there is no substantial evidence that claimant STUART was engaged in commerce, and that the burden rested on him to prove it (R. 126).

REASONS RELIED ON FOR ISSUANCE OF WRIT

The only evidence in this case, is that claimant STUART was employed by the consignee of goods transported from the Continental United States, to assist in the process of receiving such goods by such consignee, the respondents herein. This Court should exercise its supervisory authority, because the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, and other applicable decisions of this Court.

PRAYER

WHEREFORE, Your petitioner prays that this Honorable Court issue its writ of certiorari, to the Circuit Court of Appeals for the Ninth Circuit, said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and proceedings in the instant case, to the end that said case may be reviewed and determined by this Court, as provided by law, and that said judgment of the said Circuit

Court of Appeals may be reversed by this Honorable Court.

Dated at Seattle, Washington, this 19 day of Sept., 1947.

OSCAR A. ZABEL,
FREDERICK PAUL,
Counsel for Petitioners.

ZABEL, POTH & PAUL,
Of Counsel.

BRIEF

OFFICIAL REPORTS

The opinion of neither the District Court nor the Circuit Court of Appeals has been officially reported. The opinion of the District Court appears at R. 108-111, and of the Circuit Court of Appeals at R. 119-127, and 13 C.C.H. Labor Cases, Par. 63, 892.

JURISDICTION

This is an action for overtime compensation brought under the Fair Labor Standards Act of 1938, 52 Stat. 1063, 29 U.S.C., Sections 201-219. Under Section 7(a), the employer is required to pay for excess hours of work not less than one and one-half times the regular rate.[1]

An employer who violates this sub-section is liable to his injured employee in the amount due and unpaid and an additional equal amount as liquidated damages.[2]

The jurisdiction of this Court is authorized by 28 U.S.C., Section 347(a), (Judicial Code, Section 240, as amended).

---

[1]Sec. 7. (a) No employer shall, except as otherwise provided in this Section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * for a work week longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. * * *

[2]Sec. 16. (b) Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the

DATES OF JUDGMENT BELOW

The District Court entered its judgment November 9, 1945 (R. 29). The Circuit Court of Appeals entered its judgment June 27, 1947 (R. 127-128). This petition is served and filed within three months from June 27, 1947, 28 U.S.C., Section 350.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred as follows:

1. In relying upon a Conclusion of Law that the claimant's duties "were not in commerce, or in the production of goods for commerce," found in the Findings of Fact *as a Finding of Fact.*

2. In holding that the claimant has not sustained his burden of proof of establishing his duties as being in commerce.

3. In holding that the receipt by the consignee of goods transported interstate is not an activity in interstate commerce.

---

amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves or any other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action.

ARGUMENT

There is no Finding of Fact as to the duties of the claimant, except the ultimate fact that he was not engaged in commerce (R. 24), for which this Court may substitute its judgment for that of the trial court. *Bogardus v. Commissioner*, 302 U.S. 35, 39.

There is no Finding of Fact that the final destination of the goods was any particular place, so petitioner has no presumption to overcome and this Court may draw the appropriate inference of where the final destination was.

This case clearly falls within the rule of *Walling v. Jacksonville Paper Co.*, 317 U.S. 564. The claimant was intimately connected with the receipt of the goods from Continental United States. *Higgins v. Carr Bros. Co.*, 317 U.S. 572, is inapplicable because there the employee worked on the goods after arrival at the warehouse; and, the warehouse was considered its final destination, because no one knew where the goods were thereafter going. Our claimant's duties were part of the *receiving* process in the sorting yard and warehouses, that is to say, receiving of the goods by the consignee from Continental United States.

We believe it so incredulous to argue that he failed to sustain his burden of proof, as alleged by the Circuit Court of Appeals, that no claimant ever could prove his case if the manifest error by the Circuit Court of Appeals be allowed to stand. It is a case, therefore, which calls for the supervisory authority of this Court to correct.

For the Court's convenience, we have printed portions of the record in the appendix.

On the issue of Government transportation as being merely an administrative act of the Government and not commerce, reference is made to our brief in the companion case, *Soderberg, et al., v. these defendants*, pending here on Petition for writ of certiorari.

Respectfully,

OSCAR A. ZABEL,
FREDERICK PAUL,
Counsel for Petitioners.

ZABEL, POTH & PAUL,
Of Counsel.

APPENDIX

R. 87-90

Testimony of Donald D. Stuart
on Direct Examination

"Q. Will you state your duties as storekeeper while in Alaska?

A. Just how shall I answer that question—start with what I did from the start, do you mean?

Q. Yes. Give us an outline of your duties.

The Court: In Alaska.

Mr. Zabel: In Alaska.

The Court:In respect to which you are making this claim in this lawsuit?

Mr. Zabel: That is correct, Your Honor.

A. Well, I had charge of all of the records of merchandise and equipment received at this job site; the checking of the P. O.'s.

Q. Just tell the Court what a P. O. is.

A. A P. O. is a purchase order; the checking of all purchase orders; the checking of the ship's manifests; the goods when they arrive, and checking back the receipts of those against the purchase orders. It was also my duty to lay out for the actual checkers at the unloading platform the various merchandise and (70) goods that were received on the Island.

Q. Were you employed in this capacity during your full period of employment in Alaska?

A. Yes, sir.

Q. What type of goods were received?

A. All types of equipment and clothing and commissary items, in the nature of tobacco, cigarettes, shoes and also equipment and materials for the kitchens, the mess halls.

Q. Were there any materials in connection with construction of anything at the job site?

A. Our office was responsible for the checking of all materials that we were responsible for; that included black-top as well as machinery. It included fuel oil. It included all merchandise and all equipment of every nature. In fact, our office had the complete list of all of the purchase orders for everything that was purchased by the company for its use on that island.

Q. Where did these materials come from?

A. Oh, every place—all over the United States.

Q. Did you have anything to do with the actual construction of facilities and of the base itself?

A. Do you mean construction work, engineering work?

Q. Yes?

A. No, sir, not at all. (71).

Q. Can you state just how the materials were received on the island?

A. They came in by boat and after the boat was docked they were unloaded into Army trucks and brought up to a yard that had what is known as an unloading platform. All of our supplies as well as other contractors' supplies were all loaded onto this unloading platform. When they were unloaded on there, our storekeeper clerks, and the checkers checked over the various quantities which were there and took out and into our own trucks the merchandise that belonged to us; and the other companies took into their truck the merchandise that belonged to them.

These boxes, or cases,—whatever it might be—were all lettered with "B.M.K." or some character of that nature that designated who it was for and either the P.O's—purchase orders, pardon me—or the requisition number printed on it which gave our checkers the opportunity of picking out the various

things that belonged to us as against the things that belonged to other contractors.

Then they were loaded into our trucks and delivered from this unloading platform to our own warehouses.

Q. At the warehouses, what was done with reference to these (73) materials?

A. When the items were received at the various warehouses, dependent upon what it might be, the cases were opened and the merchandise checked against the purchase order for quantity.

If that particular case of items was necessary for a particular work or for the mess hall or whereever it might be, it was then routed to that particular destination.

Q. At the time of the checking against the purchase orders, was there any document involved in that proceeding?

A. Say that again, Mr. Zabel?

MR. ZABEL: I will withdraw that question.

Q. (By Mr. Zabel, continuing) At the time of the process of checking against the purchase order, were there any other papers besides the purchase order involved?

A. Well, there was the original list that I made out for my checkers to use on the unloading platform. Then the man in charge of the warehouse where these goods were checked was given four copies of what we call the engineers' receipts. He checked against that—wrote on that the purchase order number and the vendor's name, and any other pertinent history, and the quantities that were checked, and signed those four receipts, and (73) they were turned over to me. Two of those receipts I then routed to the United States Engineers' office, and one copy was put in our numerical file and

the fourth copy was put in our alphabetical file and kept and retained in the office where I was.

Q. You mentioned something about manifests. Will you describe what that is?

A. After the ship arrived at the base, there were several copies of what was known as the ship's manifests that was gotten out by the engineers for various of their departments. We were always given one copy that contained the listing of the exact amount of merchandise that had arrived on that boat.

We used that as a basis of a secondary check in finding the articles on the receiving dock.
(Record 95-96, testimony of Donald D. Stuart on cross-examination.)

Q. You say there were expediters. You weren't an expediter, were you?

A. Not on the island, sir, but in the office here in Seattle.

Q. There were certain clerks that were down there at the platform to do the checking, weren't there?

A. With the same classification that I had.

Q. I say; there were certain clerks?

A. That is correct.

Q. There were certain clerks who had been assigned to that particular duty, were there not?

A. Yes, sir.

Q. You were not assigned to that duty of checking those goods at the unloading platform, were you?

A. No, sir, except that I was responsible after the checking was done.

Q. After these men had done the checking, then they turned in their record to you, that is correct, isn't it?

A. That is correct, yes, sir.

Q. As a matter of fact, your duties were to look at the lists after they had been checked by the checkers that were down there at the dock, that is correct, isn't it?

A. I wouldn't say that, no sir; because the papers that they checked from were all prepared by me before they ever did any checking.

Q. I see. You prepared the papers?

A. Yes, sir.

Q. And gave them to them? A. Yes, sir.

Q. You weren't responsible for their work in any way, were you?

A. Not theoretically, no.

Q. Then, after they had checked and these goods had arrived in the camp, they were put in the warehouse—your warehouse at the camp, weren't they? (80).

A. Yes, sir.

Q. And from then on, you had something to do with them; that is correct, isn't it?

A. Yes, sir.

Record (102-103) Testimony of Office Manager Finn on redirect examination.

Q. As to Mr. Stewart, he mentioned preparing some lists of (88) materials that were received?

A. Yes.

Q. Those lists were prepared, were they, before the materials arrived?

A. They were. They were taken off from the manifests as furnished by the Army Engineers. He, in turn, drew off these lists so that he could hand them over to the expediters, because we were required to return those manifests as shortly as possible to them."